No. 48927-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RICHARD L. BOYD, *Appellant*,

v.

CITY OF OLYMPIA, *ET. AL.*, *Respondents*.

APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY
HONORABLE MARY SUE WILSON

BRIEF OF RESPONDENT CITY OF OLYMPIA

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I. INTRODUCTION

This case concerns industrial insurance. Specifically, it concerns whether Richard L. Boyd filed either a timely protest with the Department of Labor and Industries (Department) in the form of Dr. Roa's February 13, 2014 chart note or a timely appeal to the Board of Industrial Insurance Appeals (BIIA) as to the Department's February 18, 2014 closing order. The Department concluded he had not filed a valid protest. In response, Mr. Boyd filed an appeal with the BIIA on October 20, 2014, a date well beyond the 60-day appeal deadline.

At the BIIA, the parties had filed cross motions for summary judgment. In response to those motions, the BIIA ruled that, *as a matter of law*, there was no issue of fact to be tried and that, *as a matter of law*, Mr. Boyd had not filed either a timely protest or a timely appeal of the Department's closing order within the meaning of RCW 51.52.050, thereby granting the City of Olympia's Motion for Summary Judgment and denying Mr. Boyd's Motion for Summary Judgment. Mr. Boyd then appealed that decision to Superior Court. On hearing, the Superior Court, under a *de novo* standard of review as to both law and fact, affirmed the BIIA's decision in favor of the City of Olympia (the City).

II. ISSUES

1. Did the Superior Court err in granting the City's Motion for Summary Judgment?

1.1. Was Dr. Roa's chart note a valid protest?

1.2. Was Mr. Boyd's appeal to the BIIA timely?

2. Did the BIIA err in excluding from evidence documents appended to Mr. Boyd's Petition for Review at the BIIA?

III. STANDARD OF REVIEW

The City accepts Mr. Boyd's statement of the standard of review at page 8-9 of his opening brief.

IV. RESTATEMENT OF CASE

The City objects to those various statements in Mr. Boyd's "Statement of the Case" which are not supported by evidence in this record. If the sentences in Mr. Boyd's "Statement of the Case" are numbered, they number 1 through 35. 1. CABR 81—not in evidence. 2. CABR 81—*not in evidence*. 3. CABR 85 is the same as CABR 475 or 582, which is hearsay and not in accord with CR 56(e)[1]. 4. No citation to record. 5. No citation to record. 6. CABR 82 is the same as CABR 580,

[1] Respondent found no evidentiary objection or ruling as to this document at the BIIA.

which is hearsay and not in accord with CR 56(e)[2]. 7. CABR 84—not in evidence; CABR 85 is the same as CABR 582, which is hearsay and not in accord with CR 56(e). 8. CABR 84—not in evidence, but apparently is misattributed for CABR 85, which is the same as CABR 582, which is hearsay and not in accord with CR 56(e). 9. CABR 82 is the same CABR 580, which is hearsay and not in accord with CR 56(e). 10. CABR 87—not in evidence. 11. CABR 82 is the same CABR 580, which is hearsay and not in accord with CR 56(e); CABR 87—not in evidence. 12. CABR 82 is the same CABR 580, which is hearsay and not in accord with CR 56(e). 13. CABR 82 is the same CABR 580, which is hearsay and not in accord with CR 56(e). 14. CABR 353—in evidence. 15. No citation. 16. CABR 589—hearsay and not in accord with CR 56(e)[3]; CABR 111 is not in evidence but is the same as CABR 589, which is hearsay and not in accord with CR 56(e). 17. No citation but presumably Mr. Boyd is referring to CABR 589 & 111. 18. CABR 590--hearsay and not in accord with CR 56(e)[4]; CABR 112 is the same as CABR 590, which is hearsay and not in accord with CR 56(e). 19. CABR 590--hearsay and not in accord with CR 56(e); CABR 112 is the same as CABR 590, which is

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[2] Respondent found no evidentiary objection or ruling as to this document at the BIIA.

[3] Respondent found no evidentiary objection or ruling as to this document at the BIIA.

[4] Respondent found no evidentiary objection or ruling as to this document at the BIIA.

hearsay and not in accord with CR 56(e). 20. CABR 588--hearsay and not in accord with CR 56(e)[5]; CABR 110 is not in evidence but is the same as CABR 588, which is hearsay and not in accord with CR 56(e). 21. CABR 588--hearsay and not in accord with CR 56(e); CABR 110 is not in evidence but is the same as CABR 588, which is hearsay and not in accord with CR 56(e). 22. No citation. 23. CABR 602—unanswered requests for admissions are not evidence. 24. VRP 69—not in evidence (apparently not cited as evidence). 25. No citation. 26. No citation. 27. No citation. 28. No citation. 29. CABR 209-221—not in evidence (apparently not cited as evidence). 30. CABR 339-350 & 317-324—not in evidence (apparently not cited as evidence). 31. CABR 6—not in evidence (apparently not cited as evidence). 31. CABR 7—not in evidence. (apparently not cited as evidence) 32. CP 3-5—not in evidence (apparently not cited as evidence). 33. CP 47-49—not in evidence (apparently not cited as evidence). 34. CP 47-49—not in evidence (apparently not cited as evidence). 35. CP 50-52—not in evidence (apparently not cited as evidence).

[5] Respondent found no evidentiary objection or ruling as to this document at the BIIA.

The evidence in the Board record is provided by the following:

1. *Mr. Boyd's Motion for Summary Judgment.* To this Motion for Summary Judgment was attached Ron Meyers' declaration with three exhibits: Exhibits A, B, and C. [Mr. Meyers' declaration itself is replete with hearsay.]

Exhibit A. Page 2 of the Board's Jurisdictional History.[6]

Exhibit B. Carrie Fleischman's March 28, 2014 letter to Dr. Roa.[7]

Exhibit C. Dr. Roa's February 13, 2014 chart note.[8]

2. *The City's Motion for Summary Judgment.* To this Motion for Summary Judgment was attached Carrie Fleischman's affidavit.

3. *Mr. Boyd's Response to the City's Motion for Summary Judgment.* To this Response was attached Ron Meyers' declaration with five exhibits: Exhibits A, B, C, D and E.

Exhibit A. Page 2 of the Board's Jurisdictional History.[9] [See also Exhibit A to Mr. Boyd's Motion for Summary Judgment].

Exhibit B. Dr. Green's September 24, 2013 chart note.[10]

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[6] This is unauthenticated and hearsay to which no objection was taken.
[7] This is unauthenticated and hearsay to which no objection was taken.
[8] This is unauthenticated and hearsay to which no objection was taken.
[9] This is unauthenticated and hearsay to which no objection was taken.
[10] This is unauthenticated and hearsay to which no objection was taken.

Exhibit C. Dr. Roa's February 13, 2014 chart note.[11] [See also Exhibit C to Mr. Boyd's Motion for Summary Judgment.]

Exhibit D. The City's responses to Mr. Boyd's request for admissions. [This is not evidence.]

Exhibit E. The Board order denying the appeal in *In re Gregory R. Golliet,* BIIA Dec., 14 24313. [This is not evidence.]

4. *The City's Supplemental Motion for Summary Judgment.* To this Supplemental Motion was attached Schuyler Wallace's affidavit with three exhibits: Exhibits 1, 2, and 3.

Exhibit 1. Dr. Green's declaration dated February 23, 2015 with an Exhibit 1 being Dr. Green's concurrence of January 15, 2014. [Exhibit 1 to Exhibit 1 was not included in the Board Record.]

Exhibit 2. Dr. Roa's declaration dated February 24, 2015.

Exhibit 3. A page from Mr. Boyd's discovery deposition transcript.

The Department file transmitted to the BIIA pursuant to RCW 51.52.070 is not in evidence, except to the extent it is properly introduced into evidence through a proper declaration pursuant to CR 56. *See*

[11] This is unauthenticated and hearsay to which no objection was taken.

Hutchings v. Dep't of Labor & Indus., 24 Wn.2d 711, 716, 167 P.2d 444 (1946); *Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000, 1004 (1968); WAC 263-12-135.

Industrial Injury. On October 22, 2009, Mr. Boyd, a firefighter, sustained an industrial injury to his low back. [CABR 369 at ¶3 & CABR 583].

First Closing Order. On October 10, 2013, the Department closed this claim with a Category IV permanent partial disability (PPD) award for a dorsolumbar or lumbosacral impairment. [CABR 369 at ¶5 & CABR 328].

Dr. Green's Chart Note. On November 15, 2013, Dr. Green, a treating physician, provided the City with his September 24, 2013 chart note indicating that a dispute existed over the PPD rating and that, given two previous conflicting IME impairment ratings, a third independent medical examination (IME) may be needed to establish a preponderance of evidence as to the PPD award.[12] In addition, in more helpful detail, Dr. Green assessed (1) left internal and external "snapping" hip[13]; (2) status post left arthroscopic debridement and osteoplasty; and (3) chronic low back pain with primarily right-sided lower extremity residual. He further

[12] Dr. Green's chart note, in evidence, can be found at multiple locations in the CABR: 475-479 and 582-586.
[13] This description is not further explained in the CABR.

indicated he was referring Mr. Boyd to Dr. Roa for an ultrasound-guided steroid injection of both his psoas and greater trochanteric bursa. Then, he said "these are some new symptoms of his hips that are unlikely to be related to his previously work-related problem." [CABR 582-586].

On or about October 30, 2013, Carrie Fleischman, the third party administrator for the City, received Dr. Green's September 24, 2013 chart note. [CABR—369 at ¶6; CABR 328].

On January 2, 2014, Schuyler T. Wallace, counsel for the City, indicated that the City received Dr. Green's September 24, 2013 chart note on October 30, 2013 and that it would likely be considered a protest. [CABR 328 & CABR 370 at ¶9]. This was evidently a speculation in response to Dr. Green's recommendation for a third independent medical examination to create a preponderance of evidence as to the PPD rating identified in the Department's October 10, 2013 closing order. Indeed, on January 13, 2013, the City filed a protest to that closing order as to the PPD rating. [CABR 328].

On or about January 15, 2014, Ms. Fleischman received a letter from Dr. Green in which Dr. Green stated that the new hip symptoms which he had mentioned in his September 24, 2013 chart note, and for which he had referred MR. Boyd to Dr. Roa for injections, were unrelated

to the industrial insurance claim, number SC 77017. [CABR 370 at ¶¶8, 11, 12].

Second Closing Order. On January 27, 2014, the Department reversed its October 10, 2013 closing order, finding that the PPD rating under that earlier closing order was too generous, resulting in a PPD overpayment to Mr. Boyd. [CABR 370 at ¶9]. On January 29, 2014, Mr. Boyd filed a protest to that January 27, 2014 closing order. [CABR 370 at ¶10].

Dr. Roa's Chart Note. On February 13, 2014, Dr. Roa prepared his chart note as to his ultrasound-guided injection of Mr. Boyd's trochanteric bursa in his left hip, which he forwarded along with his bill to the City.[14] [CABR 588-592]. In that chart note, Dr. Roa noted that he was seeing Mr. Boyd for left hip pain on referral from Dr. Green pursuant to Dr. Green's September 24, 2013 chart note, and that Mr. Boyd had had arthroscopic labral debridement in early 2012 and had several months of pain relief but the pain had returned. [CABR 589]. Mr. Boyd now reported pain along the anterolateral hip. Dr. Roa noted that Dr. Green had suggested steroid injections into the anterolateral hip in the specific areas of the trochanter bursa and the psoas bursa. [CABR 589]. Dr. Roa

[14] Dr. Roa's chart note, in evidence, can be found at multiple locations in the CABR: 332-336; 481-485 or 588-592.

injected the trochanteric bursa. [CABR 590]. But he found no obvious psoas bursitis and apparently did not inject that area. [CABR 590].

Third & Final Closing Order. On February 18, 2014, the Department, in a new order, affirmed its January 27, 2014 closing order. [CABR 370 at ¶8].

On February 24, 2014, the City received Dr. Roa's chart note and bill. [CABR 370 at ¶11]. By this time, Ms. Fleischman knew from Dr. Green, the treating surgeon, that the left hip condition for which Dr. Green had referred Mr. Boyd to Dr. Roa for an injection and which Dr. Roa had treated with an injection into the trochanteric bursa was unrelated to the industrial event under claim number SC 77107. [CABR 370 at ¶¶8, 11 & 12].

On March 28, 2014, Carrie Fleischman sent a letter to Dr. Roa. In that letter, she explained she had received his chart note and bill; she had also received earlier Dr. Green's September 24, 2013 chart note in which he had reported that the left hip symptoms are new and unrelated to the industrial injury and had recommended injections to treat those new unrelated symptoms; that she had also received Dr. Green's January 15, 2014 letter in which he confirmed he was not recommending any further treatment for the industrial injury; that she enclosed both Dr. Green's documents; she informed Dr. Roa that the claim had closed on

February 18, 2014. [CABR 330]. She finally explained to Dr. Roa that it was unclear whether he sent his bill to her by mistake or whether he intended to protest the closing order and that if he sought to protest the closing order, he needed to do so within 60 days of February 18, 2014. [CABR 330 & CABR 370-371 at ¶¶11, 14 & 15].

On October 20, 2014, about eight months after the Department's February 18, 2014 closing order, Mr. Boyd, through his new counsel, Ron Meyers, filed a notice of appeal to the February 18, 2014 closing order. [CABR 371 at ¶18].

V. ARGUMENT

A. Standard of Review

The City accepts Mr. Boyd's statement of the standard of review in this court.

B. Statutory Interpretation

Mr. Boyd must be held to strict proof that he is entitled to industrial insurance benefits. *E.g., Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777, 780 (1942). This strict standard of proof is not modified or eliminated by the so-called rule of liberal construction of the Industrial Insurance Act. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other*

grounds Windust v. Dep't of Labor & Indus., 52 Wn.2d 33, 323 P.2d 241 (1958) ("We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act"). In other words, "persons entitled to the benefits of the act should be favored by a liberal interpretation of its provisions, but for this very reason, they should be held to strict proof of their title [right] as beneficiaries [under the IIA]." *Ruse v. Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909, 911 (1998), *affirmed, Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1 (1999).

Moreover, the court will not interpret an unambiguous statute. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001) ("A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable"). That is, if the meaning of a statute is clear, the court must give effect to its language without regard to rules of statutory construction. *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 418, 3 P.3d 221 (2000).

The court defers to an administrative agency's interpretation of a statute when the statute is ambiguous. *City of Pasco v. Pub. Employment*

Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992)) .

The statute establishes the legal standard. The law as to statutory interpretation applies when a statute is ambiguous. Here there is no dispute that the legal standard about protests is established by *In re Mike Lambert*, BIIA Dec., 91 0107 (1991). So there is no issue about liberally construing the statute or the legal standard that governs here. If the legal standard were stated as a conditional major premise, it would provide as follows: If *x* fact exists, then *y* legal result.

Mr. Boyd appears to be arguing that the court should liberally infer the facts from the evidence and then apply those liberally constructed facts to the conditional clause of the legal standard. That is not the law.

C. No Valid Protest

Under RCW 51.52.050, a Department order is subject to potential protest and reconsideration. Any party aggrieved by a Department order has the right to submit a written protest to the Department. *Queen City Farms, Inc. v. Central National Ins. Co.*, 126 Wn.2d 50, 98, 882 P.2d 703 (1994); *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009).

Mr. Boyd argues that Dr. Roa's February 13, 2014 chart note is a valid protest of the Department's February 18, 2014 closing order. He does so by including references to material not in evidence as part of the Board record. It is clear that this was done intentionally. RPC 3.1 & 3.4(c).

The City has a two-part argument why Dr. Roa's chart note is not a valid protest.

C1. Part One

Dr. Roa's February 13, 2014 chart note was not a valid protest.

Dr. Roa's February 13, 2014 chart note was not a valid protest under the criteria adopted by the BIIA in *In re Mike Lambert*, BIIA Dec., 91 0107 (1991). As to this issue, Mr. Boyd has adopted two inconsistent analytical approaches. On the one hand, he has argued that whether or not Dr. Roa's chart is a valid protest must be determined strictly from the four corners of that chart note with no consideration of extrinsic evidence. [CP—Plaintiff's Trial Brief at 5/16-18; VRP—30/22-25; 32/22-25; 33/1-5]. On the other hand, he has argued that such extrinsic documents (most not in evidence) should be considered along with Dr. Roa's chart note. [Mr. Boyd's Opening Brief at pages 18-28]. Under either approach, Dr. Roa's chart note is an invalid protest.

C1.1. Consider Only Dr. Roa's Chart Note

In re Mike Lambert provides that a purported protest is a valid protest (1) if it is a written document, (2) if it is received by the Department within the time allowed by law and (3) if it is "reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department." *In re Mike Lambert*, BIIA Dec. 91 0107 (1991) at page 1, lines 41-45.

In *In re Mike Lambert*, Jane Gorsky of the Department had issued an order distributing a third party recovery of $180,000 and making a demand on the claimant for reimbursement of $86,447.99. Claimant's counsel thereafter sent a letter to Jane Gorsky in which he denied that the Department had a right to the $180,000 because of the employer fault provision of RCW 51.24.060(1)(f), and in which he asked that the matter be referred to the Department's staff attorney for further discussion. Based on that letter, the BIIA concluded that Jane Gorsky knew or should have known that the claimant was disputing the Department's right to share in the third party recovery even though claimant's attorney did not refer to the Department order by date or use the word "protest" or "request

for reconsideration," indicating that the use of these "magical statutory words" was not required.[15] See RCW 51.52.050.

The third criteria of this standard is at issue here. That third criteria is analyzed into the following parts:

(3.1) *The Department Order.* To assess whether a written document is a protest, one needs to know what the Department order provides. In this case, the Department order provided that the January 27, 2014 was affirmed. [CABR 328 & CABR 371 at ¶¶14 & 17].

That order in turn requires knowledge of what is stated in the January 27, 2014 Department order. That order provided the 10/10/13 order is reversed; the claim is closed because the covered medical conditions(s) is stable; that no additional permanent partial disability will be paid over and above that paid under claim number SC 74311. [The claim involved in this appeal is SC 77017]; and that Mr. Boyd is directed to pay the self-insured employer for the overpayment of permanent partial disability in the amount of $16,828.19. [CABR 328; CABR 370 at ¶9].

The essence of this order is that by a preponderance of the medical evidence, Mr. Boyd is at "maximum medical improvement"[16] and that he has been overpaid as to his PPD award.

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[15] The use of the adjective "magical" is unfortunate. After all, the written document should be in its "intension" a protest of or request to have reconsidered a decision that aggrieves the claimant.

Nowhere in evidence in the CABR is there a document specifying the nature of Mr. Boyd's industrial injury under claim number SC 77017, except in the affidavit of Carrie Fleischman where she states it was a low back injury. [CABR 369 at ¶3].

(3.2) *Requesting Action.* Dr. Roa's chart note is hearsay and is not admissible in accord with CR 56(e), other than through a declaration from Dr. Roa indicating it is authentic. The City, however, has found no evidentiary objection to or Board ruling on this document at the BIIA. [CABR 588-592]. Does Dr. Roa's chart note recommend action? It records Dr. Roa's act of injecting Mr. Boyd's trochanteric bursa. It does not indicate what industrial injury Mr. Boyd sustained. It provides a medical history of back pain and suspected lumbar radiculopathy and left arthroscopic hip loose body removal labral debridement, partial synovectomy and osteoplasty of the femoral head neck junction. It does not indicate that these conditions are related to the industrial injury covered by the Department's orders of January 27, 2014 and February 18, 2014. It notes that Mr. Boyd had been complaining of pain in the anterolateral hip and groin. It notes that Dr. Green had suggested a injection into the trochanteric and psoas bursa. It notes that on physical examination, Mr. Boyd was tender to palpation ("TTP") over the

[16] WAC 296-20-01002(3); RCW 51.32.055.

trochanteric bursa, but not over the psoas bursa. It documents that Dr. Roa injected Mr. Boyd's left trochanteric bursa with a mixture of anesthetics and a steroid (lidocaine, marcaine and Triamcinolone Acetonide). This is action in that it records treatment he provided Mr. Boyd. It notes that he recommends Mr. Boyd continue home PT (something he apparently has been doing for some time) and follow up in four to six weeks to consider, if his pain is not improving, whether he needs an injection in the psoas or in the articular joint. This is not action in the sense of recommending additional treatment under the claim. It recommends possible treatment but it is not apparent that this possible treatment is under claim number SC 77017. Without more context or extrinsic, Dr. Roa's acts recorded in his chart note, within its four corners, is not "reasonably calculated to put the City on notice that Dr. Roa's acts are inconsistent with the Department's February 18, 2014 closing order.

(3.3) *That Requested Action Is Inconsistent with the Department Order.* Is Dr. Roa's action inconsistent with the Department order closing the claim? The answer to this question should be assessed in the context of two opposing assumptions. The first assumption (3.3.1) is that the authorized or designated reader of the chart note knows nothing about the medical context of the chart note but does know what the last Department order provides. Let's further refine that assumption. The reader can be

ignorant in two different scenarios. First, the reader can be a real person who is authorized to consider whether a written document is a protest and who is, in fact, epistemologically ignorant of context in this case. Second, the reader can be a legally created fiction, such as the reasonable prudent man, legally declared to have no contextual knowledge. It should be noted that under the assumption that the reader is ignorant of context, factually or legally, the more information must be included within the written document for it be considered a protest.

The second assumption (3.3.2) is that the authorized or designated reader of the chart note knows what the Department's last order provides and knows something (perhaps very significant information) about the medical context of the chart note.

(3.3.1.) *Reader Ignorance.* On the assumption that the authorized or designated reader of the chart note knows nothing about the medical context of the chart note but does know what the last Department order provides, is Dr. Roa's action inconsistent with the Department order closing the claim? Whether Dr. Roa's action is inconsistent with the Department order cannot be determined from the four corners of this chart note. Dr. Roa does not identify a claim number. He does not refer to the employer of injury. He does not refer to the closing order of January 27, 2014 or February 18, 2014. He has no comment indicating that he is

protesting anything or requesting that some consideration by someone be reconsidered. He does not identify the nature of the industrial injury. He does not indicate what he knows about the industrial injury, if anything? He does not identify whether or not he is treating a condition proximately related to the industrial injury. That is, he does not indicate whether an inflamed trochanteric bursa is related to an industrial injury. He does not indicate that the treatment he provided is curative or merely palliative. If it is merely palliative, that treatment is consistent with Mr. Boyd being at "maximum medical improvement," assuming the condition is proximately related to the industrial injury. WAC 296-20-01002(2)(b).

How much information must be inferred from this chart note to conceive of it as, by intension,[17] protesting something or requesting someone to reconsider some decision? Obviously, it requires inferences beyond what a valid protest requires.

(3.3.2.) *Reader Is Knowledgeable.*

The *In re Mike Lambert* standard does not appear to contemplate that the mind of the authorized reader be factually or legally sequestered behind a veil of ignorance. That is, that standard does not appear to contemplate that the authorized reader be ignorant about what conditions the Department has allowed under the claim. Nor does that standard

[17] That is, what the text connotes.

appear to contemplate that the authorized reader disregard or discard knowledge he/she has about what conditions the treating physician has declared to proximately related to the industrial event under the claim.

On the assumption that the authorized or designated reader of the chart note knows something about the medical context of the chart note and knows what the last Department order provides, is Dr. Roa's action inconsistent with the Department order closing the claim? The answer is that the chart note is not inconsistent with the Department order. Here, the authorized reader is Ms. Fleischman, the City's authorized representative. In connection with what Ms. Fleischman knew when she first read Dr. Roa's chart note are two pieces of evidence: Dr. Green's September 24, 2013 chart note and her affidavit.

Dr. Green's Chart Note. Dr. Green authored a September 24, 2013 chart note. [CABR—475 or 582]. That chart note states that Dr. Green is sending Mr. Boyd to his partner (*viz.*, Dr. Roa) for an ultrasound-guided injection of both the psoas and greater trochanteric bursa. [CABR—475 or 582]. He says that "these are some new symptoms of his hips that are unlikely to be related [to] his previously worked-related problem." [CABR—582]. Dr. Green also mentions difficulties resolving a dispute over an Illinois claim (a claim other than SC 77017) as he [Mr. Boyd] has two IME assessments and that Dr. Green has recommended a

third IME to break the tie. [CABR—582]. Before receiving Dr. Roa's chart note, the City had checked with Dr. Green as to the significance of his chart note of September 24, 2013, and learned from him that the conditions for which he was referring Mr. Boyd to Dr. Roa for steroid injections were unrelated to the industrial injury. [CABR—370 ¶8].

Carrie Fleischman's Affidavit. In her affidavit to the City's Motion for Summary Judgment, Ms. Fleischman, the City's third party administrator, provides context for Dr. Green's chart note, and then for Dr. Roa's chart note. [CABR—369-371]. Based on information Dr. Green provided to Ms. Fleischman before Dr. Roa authored his chart note, Ms. Fleischman understood that the conditions for which Dr. Green was referring Mr. Boyd to Dr. Roa were unrelated to the industrial injury. [CABR—370 at ¶8]. So when she received Dr. Roa's chart note and bill, she already knew from Dr. Green that the conditions for which he referred Mr. Boyd to Dr. Roa were unrelated to the industrial injury. [CABR—370 ¶¶8, 11 & 12]. Given that information, she could not reasonably interpret Dr. Roa's chart note as a protest of the Department orders of January 27, 2014 or February 18, 2014.

Ms. Fleischman, then, has provided uncontradicted evidence that by the time she received and read Dr. Roa's chart note, she knew from Dr. Green, who had referred Mr. Boyd to Dr. Roa for the injection, that what

Dr. Roa was treating with that injection was unrelated to the industrial insurance claim number SC 77107. There is no evidence that Dr. Green misinformed her about Mr. Boyd's new left hip condition. So, given what she knew from Dr. Green, she knew from the four corners of Dr. Roa's chart note, it was not a protest. She knew that anyone knowing what she knew would not reasonably interpret Dr. Roa's chart note as a protest under the claim, number SC 77107. Under the standard of *In re Mike Lambert*, the court cannot dissociate or abstract the text of the writing from what the authorized reader of the text knows when reading that text. In this case, there is no obvious conflict between what the text provides and what the reader knows about the text.

C1.2. Consider Extrinsic Evidence

What extrinsic evidence is, in the context of assessing whether a chart note is a protest, needs to be defined or refined. Most basically, it is extrinsic to the text of the chart note itself. But as discussed above, some information extrinsic to the chart note is necessarily required—namely, the Department order at issue. Extrinsic evidence also could be evidence of what the authorized reader knew when he/she first read the chart note. That would be testimony from the reader. As the City's argument under (3.3.2.) above evidence of that knowledge cannot be divorced from any test about what the text means. Extrinsic evidence also could be evidence

of the author's intent to the extent that the text of the chart note fails to serve up that intent as to whether the chart note was meant to be a protest. Extrinsic evidence also could be the Department allowance orders explaining what medical conditions have been allowed under the claim. If such orders are unclear about what conditions have resulted from the industrial event, then extrinsic evidence could be physician testimony through deposition or declarations about what medical conditions were proximately caused by the industrial event.

With that preliminary analysis in mind, let's turn to Mr. Boyd's argument. Mr. Boyd has provided a long inventory of extrinsic documents on which he has relied to support his argument on this issue. Some of these documents were rejected as evidence at the Board, a ruling that was not reversed by the Superior Court. In Mr. Boyd's opening brief, see page 21 (reference to CABR 118), page 22 (references to CABR 71, 73, 75), page 23 (references to CABR 75, 77, 97), page 24 (references to CABR 79, which is also CABR 475 and 582,[18] which is hearsay and not in accord with CR 56(e)), page 25 (references to CABR 111, which is also 482 and 589,[19] which is hearsay and not in accord with CR 56(e); &

[18]Respondent found no evidentiary objection or ruling as to this document at the BIIA.

[19] Respondent found no evidentiary objection or ruling as to this document at the BIIA

Appendix A, which is not part of the BIIA record), page 26 (references to CABR 594-599, which are requests for admissions to which objections were lodged), and page 27 (references to CABR 594-599). One multipage document is being proffered for the first time in this court. See Appendix A of Mr. Boyd's opening brief at page 25. The City objects to this document. The City moves to strike all such references to documents not in evidence at the BIIA as inappropriate.

In this case, the significant extrinsic evidence is Dr. Roa's declaration.[20] (Dr Green's declaration is consistent with his September 24, 2013 chart note, discussed above.[21]) The *In re Mike Lambert* standard does not appear to contemplate ignoring the author's intent but does appear inconsistent with looking outside the four corners of the written text to establish what the author intended. That is, if the authorized reader, after having read the written document, has doubt about its meaning, then

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[20] The most significant document would that Department order allowing the industrial injury under claim number SC 77017, but that document is not in evidence. What is known, from the affidavit of Ms. Fleischman, is that the claim was allowed for a low back injury. [CABR 369 at ¶3]. The recitation of Mr. Boyd's medical history in the chart notes of Drs. Green and Roa about Mr. Boyd's left hip condition does not indicate that the left hip was an allowed condition under claim number 77107. There is no evidence that the industrial injury was a left hip injury.

[21] Dr. Green declared that, more probably than not, the trochanteric bursa and psoas bursa for which he referred Mr. Boyd to Dr. Roa were unrelated to the industrial injury [CABR—557-558]. He notes that he so informed the City, through Ms. Fleishman, on January 15, 2014. [CABR—557 at ¶1].

it is not a valid protest; it is not "reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department." *In re Mike Lambert* at page 1, lines 41-45.

In Dr. Roa's declaration, Dr. Roa declared that he did not intend his chart note to be a protest. [CABR—560 at ¶5]. Given what Dr. Green had earlier informed the City, the City would be skeptical that Dr. Roa was treating a related condition, and, from an abundance of caution, could have been expected to check with Dr. Roa, as it did. [CABR—370 at ¶14]. Dr. Roa further stated that he did not mention in his chart note that the condition he treated was related to the industrial injury, and that he has no opinion whether the condition he treated or his treatment was related to the industrial injury. [CABR—559 at ¶¶2 & 4].

Can a chart note be a protest when its author did not intend it to be a protest (*viz.*, intended not to report anything inconsistent with the Department order)? (For instance, suppose the author calls the Department/self insured employer just before he sends his written chart note explaining that what he is sending is not intended to be a protest.) Or can a chart note be a protest despite its author's contrary intent if the appropriate reader reasonably interprets it to be a protest?

The City argues that that issue about authorial intent is moot here if the reader has, as did Ms. Fleischman, foreknowledge from a treating physician that the condition described in the chart note is unrelated to the industrial injury. Dr. Green had informed her before she received Dr. Roa's chart note that the inflamed trochanteric bursa which he asked Dr. Roa to inject with steroid, as identified in his chart note, was unrelated to the industrial injury. In that context, the reader's response that it is not a protest is reasonable.

But if the reader is puzzled whether or not the author intended the chart note to be a protest, then the chart note is not a protest, but the reader should be able to consult with the chart note's author within the 60-day protest period to determine the author's intent. This would be analogous to a jurist, asked to interpret a document that proved ambiguous when considered alone, seeking extrinsic evidence of its meaning.

Mr. Boyd's Improper Extrinsic Documents. Mr. Boyd urges the court to consider additional extrinsic documents, but with the exception of the chart notes of Drs. Roa and Green, none of those proffered documents are in evidence, *viz.*, CABR 118, 71, 73, 75, 77, 97, Appendix A and Mr. Boyd's request for admissions, to which there were no admissions. All this information must be disregarded.

C2 Part Two

> Given the facts in this case, a physician's protest is insufficient to place this closing order in abeyance by operation of law.

There are two ways to have an order placed in abeyance. First, the claimant or attending physician[22] may lodge with the Department a valid written protest in response to the Department's written admonition in the order being protested. RCW 51.52.050(1)&(2)(a); RCW 51.52.060(3); *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991).

The BIIA has held that this first avenue is authorized under the fourth proviso of RCW 51.52.060.[23] *In re Santos Alonzo*, BIIA Dec., 56,

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[22] WAC 296-20-09701; see *In re Harry Pitts*, BIIA Dec., 88 3651 (1989).

[23] RCW 51.52.060(3) provides in relevant part as follows:

> [4th proviso] If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter.
>
> [5th proviso] In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

833 (1981). Second, the Department, on its own initiative, does so pursuant to RCW 51.52.060. Mr. Boyd does not assert that this second avenue occurred.

As to the first avenue, on the face of the Department's February 18, 2014 closing order, the Department printed notice to the claimant under the command of RCW 51.52.050 providing in relevant part as follows:

> This order becomes final 60 days from the date it is communicated to you unless you do one of the following: File a written request for reconsideration with the Department or file a written appeal with the Board of Industrial Insurance Appeals. If you file for reconsideration, you should include the reasons you believe this decision is wrong and send it to: Department of Labor and Industries, *etc.*
>
> The BIIA has held as follows:
>
> It has long been our interpretation of the printed wording in the Department's orders *** that a 'protest' or 'request for reconsideration' filed with the Department *in response* to the admonitory language in the order *automatically* operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a 'further appealable order.' [Emphasis supplied.]

In re John Robinson, BIIA Dec., 59,454 (1982); *see also In re Santos Alonzo*, BIIA Dec., 56,833 (1981); *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991).

The City contends that when the attending physician's chart note is created before the order is issued, the closing order is not automatically placed in abeyance—unless, after the claimant/AP receives the order, the chart note is communicated to the Department in response to the language in the order directing the claimant or attending physician to file the protest within 60 days of receipt of the order. Simply, if the claimant/AP has not read the admonitory language in the order, he/she is not responding to that language in preparing and communicating the chart note.

Here, there is no evidence if or when Dr. Roa received the closing order. That is, no evidence demonstrates that Dr. Roa was responding to the Department's admonitory language in its order. Mr. Boyd has the burden of proving those facts.

When the chart note is created before the claimant/attending physician receives the order, and is communicated to the Department or employer either before or after receipt of the order but in no event in response to the admonitory language of the order, the Department must act to place the order in abeyance under the criteria of RCW 51.52.060 (the 5th proviso).

RCW 51.52.060(3) provides in its fifth proviso as follows:

> In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the

> department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days. [Emphasis supplied.]

That is, the Department must issue an order placing the closing order in abeyance for the order to be in abeyance. The closing order is not placed in abeyance by operation of law.

Here, there is no evidence that the Department directed the submission of further evidence pursuant to RCW 51.52.060 after it issued its February 18, 2014 closing order. Nor is there evidence that the Department, on its own direction, after issuing the closing order issued another order placing the closing order in abeyance under RCW 51.52.060.

D. No Judicial Estoppel.

Mr. Boyd argues that the City is estopped from arguing that Dr. Roa's chart note is not a valid protest. This argument has two distinct parts: (1) that the City is estopped from arguing that Dr. Roa does not have standing to lodge a protest and (2) that the City is estopped from arguing that the content of Dr. Roa's chart note is not reasonably calculated to notify the Department that claimant (through the respective physician) is requesting action inconsistent with the Department's decision

closing the claim. The City addresses the second part of Mr. Boyd's argument.

This argument is flawed for several reasons. First, judicial estoppel is an equitable defense. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Under this defense, a party may not assert one position in a judicial proceeding and later seek an advantage by taking a clearly inconsistent position in another judicial proceeding. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Here there has been only one judicial proceeding, and so no inconsistencies exist *between* judicial proceedings.

Second, the process of protesting a closing order falls within the statutory mandate of Title 51 RCW. That statutory mandate cannot be circumvented through defenses based on equitable principles. That is, a potential claimant cannot create a right under that Industrial Insurance Act through equitable estoppel.[24] *See Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 240 P.2d 567, 568 (1952) (the time limitation was a limit on the right, not on the remedy); *cf Estate of Thomas C. Hall v. HAPO Federal Credit Union*, 73 Wn. App. 359, 869 P.2d 116, 118 (1994) (a party cannot create a right to insurance through the doctrine of equitable estoppel).

[24] A valid protest conditions the right to have a closing order rescinded (held in abeyance), which conditions the right to continued benefits.

Third, the premises of Mr. Boyd's argument are based on references to letters or documents from the City's counsel at CABR 84,[25] 85[26], 87[27], and 348[28] which are not in evidence. CABR 84, 85 (see CABR 475 or 582) and 87 are exhibits to Mr. Meyer's declaration appended to Mr. Boyd's Petition for Review at the Board, and, with the exception of Dr. Green's chart note at CABR 475 or 582, which is otherwise in evidence (though hearsay), are not exhibits to declarations or affidavits submitted with the cross motions for summary judgment.[29] CABR 348 is a reference to statements by the City's counsel in the City's Motion for Summary Judgment. Those statements are not evidence. At pages 30 and 31 of his brief, Mr. Boyd quotes a statement from a purported letter from the City's counsel for which he fails to cite to the CABR. Presumably, that quoted material is likewise not in evidence.

Fourth, Mr. Boyd has asserted that, as the keystone of his argument that Dr. Roa's chart note is a protest, only Dr. Roa's chart note should be considered in assessing whether or not it is a protest. For that reason, he argues that the declarations of Drs. Roa and Green should not be

[25] See pages 28 and 30 of Mr. Boyd's Brief. The reference to CABR 84 on page 30 is apparently a miscitation to Dr. Green's chart note at CABR 85.
[26] See page 28 of Mr. Boyd's Brief.
[27] See page 29 of Mr. Boyd's Brief.
[28] See page 30 of Mr. Boyd's Brief.
[29] Dr. Green's chart note appears as Exhibit B to Mr. Meyer's declaration to Mr. Boyd's Response to the City's Motion for Summary Judgment. [CABR—475]. That chart note is clearly hearsay for which no hearsay exception applies.

considered. [VRP 30/22-25; 32/22-25; 33/1-5; CABR 557-558 & 559-560]. He argues that that evidence is extrinsic to Dr. Roa's chart note. Yet now he argues that whether or not Dr. Roa's chart note is a protest should be determined in part by information extrinsic to that chart note, namely both Dr. Green's chart note (hearsay) and letters from the City's counsel not in evidence.

Fifth, Mr. Boyd's estoppel argument assumes that Dr. Green's chart note is on par with Dr. Roa's chart note intrinsically under the standard of *In re Mike Lambert*—that is, that both chart notes are not reasonably calculated to notify the Department that claimant (through the respective physician) is requesting action inconsistent with the Department's decision closing the claim.[30] But they are not on par. *Anfinson*, 174 Wn.2d at 861 ("whether the party's later position is clearly inconsistent with its earlier position"). The City protested the Department's October 10, 2013 order as to the PPD awarded in that order under claim number SC 77017. On another claim—number SC 74311—Mr. Boyd had been awarded PPD of some amount for an unidentified industrial injury. For unidentified reasons, the City believed that no PPD

[30] Only if both chart notes fail to satisfy the *In re Mike Lambert* standard does the estoppel argument have some conceivable practical use. That is, Dr. Green's chart note must be inadequate as a protest but because the City said it could be a protest, the City is estopped to argue that Dr. Roa's chart note, which is also inadequate as a protest, is not a protest.

should have been awarded under SC 77071 for a dorso-lumbar and or lumbosacral impairment given the PPD award under claim number SC 74311.[31] The Department concurred, and issued a new order dated January 27, 2014, indicating that "no additional permanent partial disability will be paid over and above that paid under claim number SC 74311." [CABR 328 & CABR 370 at ¶9].

What is it that the City believed about how Dr. Green's chart note related to the October 10, 2013 Department order that prohibits the City from believing that Dr. Roa's chart note is not reasonably calculated to put the City on notice that Dr. Roa is requesting action inconsistent with the Department's February 18, 2014 closing order? The answer is, nothing. Dr. Green's chart note is inconsistent with the Department's October 10, 2013 closing order as to the PPD award, but not as to Mr. Boyd being at maximum medical improvement.[32] Dr. Green said two IME assessments of PPD conflict and so a third IME is needed to establish a preponderance of the evidence. That does not impact the finding that Mr. Boyd is at maximum medical improvement.

[31] Presumably, this is so because the PPD award for a dorso-lumbar and/or lumbosacral impairment under SC 74311 was higher than a PPD award for a Category IV dorso-lumbar and/or lumbosacral impairment under SC 77017.

[32] PPD is assessed by qualified physicians once the claimant has reached maximum medical improvement.

So in his argument, Mr. Boyd's reasoning then essentially begs the question whether or not Dr. Roa's chart note is reasonably calculated to notify the Department that claimant (through the respective physician) is requesting action inconsistent with the Department's decision closing the claim. The doctrine of judicial estoppel should not preempt that assessment.

E. Untimely Appeal to BIIA

If Mr. Boyd failed to file a timely protest with the Department, then Mr. Boyd failed to file a timely appeal with the BIIA in that his notice of appeal was filed more than 60 days after the Department's February 18, 2014 closing order. RCW 51.52.050(2)(a).

If Mr. Boyd filed a timely protest with the Department, Mr. Boyd argues that his notice of appeal filed with the BIIA on October 20, 2014 was timely. In more detail, he argues that when the Department issued its February 18, 2014 closing order, he had, based on a boxed notice on the order, 60 days from that date within which to file either a protest with the Department or file a notice of appeal with the BIIA as to that order.[33] RCW 51.52.050; RCW 51.52.060(1)(a). If he had filed a valid protest with the Department within that 60-day period, the protest automatically

[33] Mr. Boyd could have protected himself by filing a protest with the Department and by filing a notice of appeal with the BIIA within 60 days of the Department's order.

placed that February 18, 2014 closing order in abeyance. In that event, the Department then would need to issue a further responsive order before the appeal period began. RCW 51.52.060(3)[34].

If the Department failed or declined to act in a way that indicated it recognized that alleged protest as a valid protest, then as Mr. Boyd implicitly argues, he could wait indefinitely before requesting that the BIIA declare the alleged protest to be a valid protest.[35] In other words, the Department acts at its peril first in not scrutinizing every chart note it receives to determine whether that chart note could be construed as a valid protest and then in not issuing an order either declaring the chart note not to be a protest or declaring that it is placing the protested order in abeyance.

The City disagrees with Mr. Boyd's interpretation. Assuming for the sake of argument that the alleged protest is valid, and that the Department need not issue an order placing the protested order in abeyance, then the Department must issue a further order in response to the protested order now in abeyance, affirming or reversing it. Is there a deadline within which the Department must enter such further order?

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[34] The fourth proviso of RCW 51.52.060(3). See *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991).

[35] As a failsafe, Mr. Boyd could also have filed a notice of appeal with the BIIA if the 60 days had not expired to hedge against the alleged protest being declared invalid.

There is. As the BIIA has held, the Department must issue that order within the time limit specified in RCW 51.52.060(3) (within 90 days of communication of the protest to the Department). *In re Clarence Haugen*, BIIA Dec., 91 1687 (1991) (the fifth proviso of RCW 51.52.060 applies as to the deadline).[36]

If the Department does not respond with an order within the 90-day deadline, then, as the City argues, the aggrieved party needs to file a notice of appeal with the BIIA within 60 days of the expiration of the 90-day deadline. Otherwise, as the City argues, the protest should be a nullity. Simply, the issue raised in the alleged protest should not be allowed to remain in limbo indefinitely. Some party should be forced to compel action within a deadline. That party should be the aggrieved party. The aggrieved party is the party filing the protest. That party should bear the burden of filing a notice of appeal with the BIIA within a deadline to bring the issue to resolution. In this case, that party is Mr. Boyd.

Mr. Boyd did not act timely. The Department or the City received Dr. Roa's chart note on February 24, 2014. [CABR 353]. Ninety days later was May 25, 2014. Sixty days after May 25, 2014 was July 24, 2014. Mr. Boyd did not file his notice of appeal with the Board until October 20, 2014. As a result, Mr. Boyd's appeal to the BIIA should be time barred

[36] See previous footnote.

F. Department's File Not Evidence

Mr. Boyd asserts a two-part argument: (1) the BIIA should have admitted into evidence the exhibits to Mr. Meyer's declaration appended to Mr. Boyd's Petition for Review at the BIIA and (2) those same exhibits in the Department's claim file became part of the record when Mr. Boyd noted in his Motion for Summary Judgment that the evidence upon which he relies includes "the records of the SIE and the Department."

As to the first part of Mr. Boyd's argument, that argument is flawed for several reasons. First, those exhibits were not introduced into evidence at the hearing on the cross motions for summary judgment. Second, the BIIA's decision to not reopen the BIIA record for newly discovered evidence was well founded for the reasons it stated.

As to the second part of Mr. Boyd's argument, that argument is also flawed for several reasons. First, the documents identified by these exhibits may have been part of the Department's record transmitted to the BIIA pursuant to RCW 51.52.070, but that does not mean they were admitted into evidence as part of the BIIA record. *See Hutchings v. Dep't of Labor & Indus.*, 24 Wn.2d 711, 167 P.2d 444 (1946); WAC 263-12-135.

Second, Mr. Boyd does not properly introduce such documents into evidence by merely declaring that he relies upon such documents to

support his motion for summary judgment. *See, e.g.*, CR 56(e). He has begged the issue as to their admissibility under the Washington Evidence Rules.

G. No Attorneys' Fees

Mr. Boyd's arguments are not well taken. He should not be awarded attorneys' fees.

VI. CONCLUSION

For the preceding reasons, City of Olympia respectfully requests that this Court affirm the Superior Court's judgment affirming the decision of the Board of Industrial Insurance affirming the closing order of the Department of Labor and Industries dated February 18, 2014.

Respectfully submitted this 26th day of October 2016.

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CERTIFICATE OF SERVICE

I, hereby certify that I filed the foregoing **Brief of Respondent City of Olympia** via Fed Ex, the original thereof as follows:

ORIGINAL TO: David C. Ponzoha, Court Clerk
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I further certify that I served the foregoing **Brief of Respondent City of Olympia** on attorneys of record and other parties by mailing copies on October 26, 2016, addressed to said persons at their last known address as follows:

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